UNITED STATES TAX COURT
WASHINGTON, DC 20217

HOFFMAN PROPERTIES II, L.P., FIVE M ACQ I, LLC, TAX MATTERS PARTNER,	)	
Petitioner,	)	
v.	)	Docket No. 14130-15.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

By notice of final partnership administrative adjustment dated March 3, 2015, respondent disallowed a $15,025,463 deduction for a noncash charitable contribution (contribution) for the taxable year ending December 31, 2007, (year at issue) of petitioner Hoffman Properties II, L.P (Hoffman), and determined accuracy-related penalties under section 6662.[1] On May 29, 2015, Five M Acq. I, LLC (TMP), the tax matters partner for Hoffman, filed a petition for readjustment of partnership items under section 6226, challenging these determinations.

On August 24, 2017, respondent filed the present Motion for Partial Summary Judgment (motion) and a supporting memorandum of law. Respondent's motion seeks summary judgment as to whether a portion of Hoffman's contribution, the use restrictions encumbering the airspace of a specific property, fails to satisfy the perpetuity requirements of section 170(h)(5)(A) and section 1.170A-14(e) and (g), Income Tax Regs.[2] On August 25, 2017, respondent

[1]All section references are to the Internal Revenue Code (Code) and regulations in effect for the tax year at issue. All Rule references are to the Tax Court Rules of Practice and Procedure. All monetary amounts are rounded to the nearest dollar.

[2]Because, in deciding this issue, we determine that Hoffman is not entitled to the noncash charitable contribution deduction for the year at issue, we need not reach respondent's alternative argument as to whether Hoffman's contribution satisfied the "qualified real property interest" requirements of sec. 170(h)(2)(c).

filed a First Amended Motion for Partial Summary Judgment. For the reasons stated below, we shall grant respondent's motion as amended.

Background

Hoffman and TMP were formed and operate in the State of Ohio. Hoffman was formed as a partnership and is treated as such for Federal income tax purposes. At all relevant times, Hoffman[3] owned the Tremaine building (building) located at 1303 Prospect Ave., Cleveland, Ohio, as well as a pair of adjacent parking lots (adjacent lots) located at 1227 Prospect Ave., Cleveland, Ohio (collectively, the property).

On December 28, 2007, Hoffman conveyed to the American Association of Historic Preservation (AAHP) an easement deed agreement (agreement) encumbering specific aspects of the property. Hoffman's contribution comprised a set of use restrictions encumbering (1) the exterior of the building (the easement), and (2) the air space above the building and adjacent lots (the restriction).[4]

AAHP is a non-profit corporation organized under the laws of the State of Ohio, and at the time of the conveyance was a recognized section 501(c)(3) public charity with the purpose of furthering historic preservation.

The conveyance was recorded on December 31, 2007, in Cuyahoga County, Ohio. Hoffman considered the conveyance a noncash charitable conservation contribution, and as such--on September 29, 2008--claimed a $15,025,463 deduction on its self-prepared, timely return for the year at issue.

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[3]Whether directly or through its wholly owned subsidiary Prospect Ave Parking, LLC.

[4]On August 5, 2016, respondent filed a Motion for Partial Summary Judgment (first motion), with respect to the easement portion of the contribution. On July 12, 2017, this Court issued an Order granting respondent's first motion (first order), holding that Hoffman's contribution of the easement failed to entitle Hoffman to a deduction for the year at issue, as it failed to satisfy the requirements of sec. 170(h)(4)(B).

The Agreement and Terms of The Restriction

The agreement contains a number of recitals both recognizing AAHP's non-profit status and its eligibility to receive qualified conservation contributions under section 170(h), and expresses the parties' mutual desire to preserve the property's "open space features" and to deliver the general public a significant benefit from the preservation thereof. The agreement defines open space features as "the scenic panorama and historic urban landscape of the neighborhood in which the [p]roperty is located."

To achieve this end, the agreement grants AAHP the restriction.[5] Through this restriction Hoffman generally relinquishes its right to develop the property's air space, and covenants to maintain such in "a manner so as not to impair or interfere with the Open Space Features of the Property", stating, in relevant part:

> The purposes of the Restriction are to assure [sic] that the Open Space Features of the Property will be retained and maintained forever for the scenic, aesthetic, cultural and historic enjoyment of the general public and to prevent any use of the Air Space, except as specifically permitted in this Easement Agreement.

The agreement, however, recognizes that Hoffman's contribution does not represent Hoffman's full interest in the property. In order to reconcile the restriction with Hoffman's retention of the underlying property, the agreement establishes three tranches of rights with respect to Hoffman's continuing use of the property: (1) the unrestricted reserved; (2) the conditional or restricted; and (3) the expressly prohibited.

The Unrestricted Reserved Rights

Article 4 of the agreement establishes an explicit baseline for the restriction. It provides Hoffman the absolute right to engage in all acts and uses that "do not substantially impair * * * the Open Space Features" and "are not inconsistent with

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[5]The agreement defines "the Restriction" as the relinquishment of the "Air Space Development Rights". Air space development rights is a defined term encapsulating the "right to build any addition within the Air Space." Air space is defined as the "spaces * * * alongside the Building and above the roof of the building".

the purposes of" the agreement. The agreement's default rule provides that Hoffman may engage in all uses of the underlying property not expressly prohibited or otherwise restricted by the agreement, and deems that any use not so prohibited or restricted is consistent with the purposes of the agreement. With respect to these unrestricted rights, Hoffman's ability to act is unfettered and requires no prior notification to, or approval by, AAHP.

The Restricted, Conditional Rights

Article 3 of the agreement explicitly restricts Hoffman's right to make certain uses of the air space. In order to exercise any of its restricted rights, Hoffman must first seek and receive AAHP's permission to proceed. Paragraph 3.1 states, in relevant part (emphasis added):

> Without the prior express written approval of Grantee [i.e., AAHP], which shall be exercised in accordance with Paragraph 3.2 and Paragraph 3.3 herein, Grantors [i.e., Hoffman] shall not undertake any of the following actions * * *
>
> (a) Construct any lateral addition to the Building (as opposed to any vertical addition within the Air Space) or further develop the Property in a manner contrary to the Secretary's Standards;
>
> * * *
>
> (f) Alter or change the appearance of the Air Space in a manner contrary to the Secretary's Standards; or
>
> (g) Erect external signs or advertisements (meaning signs or advertisements mounted or placed on the exterior of the Building which are visible to persons viewing the exterior of the Property) within the Air Space.

Should Hoffman wish to make use of the property in any manner listed above, paragraph 3.2 of the agreement requires Hoffman to provide AAHP a formal request for permission (RFP) to proceed. The RFP must contain all plans, specifications, design drawings and schedules relevant to the restricted use Hoffman wishes to undertake.

The agreement does not expressly constrain the scope, scale, or character of work Hoffman may propose in such an RFP. The agreement does not impose on Hoffman an affirmative duty to self-evaluate its RFP against any relevant standards prior to submitting such to AAHP. The agreement, instead, requires AAHP to review any RFP submitted by Hoffman. In doing so, AAHP must "apply" the "secretary's standards"[6] and, informed thereby, approve or reject Hoffman's RFP.

The agreement provides AAHP a 45-day window to complete its review of any RFP and tender a formal disposition to Hoffman with respect thereto. If AAHP fails to expressly reject or approve Hoffman's RFP within this 45-day window, then a default rule (the 45-day default provision) provides that AAHP's failure:

> shall be deemed to constitute approval by Grantee [i.e., AAHP] of the plan or request as submitted and to permit Grantors [i.e., Hoffman] to undertake the proposed activity in accordance with the plan or request as submitted.

The Covenant to Maintain and Prohibited Rights

Article 2 of the agreement obliges Hoffman to maintain the air space in a way so as not to impair or interfere with the open space features of the property.

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[6]The agreement defines "the Secretary's standards" in paragraph 3.3 as the "Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings," located at 36 C.F.R. sec. 67.7. Paragraph 2.3 of the agreement similarly, but more broadly, defines the Secretary's standards by reference to 36 C.F.R. sec. 67, generally.

We take notice of the entirety of 36 C.F.R. sec. 67. These regulations were promulgated by the Department of the Interior (DOI), pursuant to a designation of authority contained in sec. 47(c)(2)(C), and (c)(3) of the Code, and are collectively titled "Historic Preservation Certifications Under the Internal Revenue Code." Sec. 170(h)(4)(C)(ii) incorporates this delegation of authority, and appropriates these regulations by reference.

Sec. 47 governs a taxpayer's eligibility for tax credits resulting from the rehabilitation of a certified historic structure. Sec. 170(h)(4)(C)(ii) governs the deductibility of donations for qualified conservation contributions that preserve buildings located in registered historic districts certified as significant thereto by the DOI.

To this extent, and as relevant here, Article 2 expressly prohibits the placement or erection of any "other buildings or structures, including satellite receiving dishes, small rooftop dishes, antenna or other data transmission or receiving devices or canopies" within the air space.

The Grant of Rights to AAHP

The agreement further provides AAHP with various rights, responsibilities, and obligations meant to advance the stated conservation purpose of the agreement. Notably, the agreement provides AAHP the authority to pursue any and all legal or equitable remedies against Hoffman, but only if Hoffman violates the agreement's terms.

Discussion

I. General

A. Summary Judgment

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted with respect to all or any part of the legal issues in controversy "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits or declarations, if any, show that there is no genuine dispute as to any material fact and that a decision may be rendered as a matter of law." Rule 121.

The moving party bears the burden of proving there is no genuine issue of material fact. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). The factual materials and the inferences drawn therefrom will be considered in the light most favorable to the nonmoving party. Bond v. Commissioner, 100 T.C. 32, 36 (1993). When a motion for summary judgment is made and supported, the opposing party cannot rest upon mere allegations or denials, but must "set forth specific facts showing that there is a genuine dispute for trial." Rule 121(d).

Whether the agreement satisfies the requirements of section 170(h) is a legal question appropriate for summary judgment. See Palmolive Bldg. Investors, LLC v. Commissioner, 149 T.C. __, __(October 10, 2017). As we consider respondent's motion, we draw any factual inferences in favor of Hoffman.

B. Conservation Contributions

Section 170(a)(1) provides taxpayers a deduction for any charitable contribution made during the taxable year. Charitable contributions may include gifts of property to charitable organizations that are made with charitable intent and without the receipt or expectation of receipt of adequate consideration. Zarlengo v. Commissioner, T.C. Memo. 2014-161, at *18; see sec. 1.170A-1(h)(1) and (2), Income Tax Regs.

Section 170(f)(3)(A) disallows a deduction for noncash charitable contributions of property consisting of less than the donor taxpayer's entire interest in that property. The Code, however, provides an exception to this general all-or-nothing rule for a taxpayer making a "qualified conservation contribution". Sec. 170(f)(3)(B)(iii). A qualified conservation contribution is defined as the contribution of a "qualified real property interest", to a "qualified organization", that is made "exclusively for conservation purposes." Sec. 170(h)(1). The requirements of section 170(h)(1) are conjunctive, and failure to satisfy any one of these elements will preclude a contribution from being a deductible qualified conservation contribution. See Carroll v. Commissioner, 146 T.C. 196, 205 (2016).

C. Perpetual Protection of the Conservation Purpose

A contribution is considered made for a "conservation purpose" if the contribution: (1) preserves an outdoor recreational land area for the use or education of the general public; (2) preserves a historically important land area or certified historic structure; (3) protects the habitat of particular flora or fauna; or (4) preserves an open space for the scenic enjoyment of the general public, or pursuant to a clearly delineated Federal, State, or local government conservation policy. Sec. 170(h)(4)(A).

A contribution made for any these conservation purposes will be considered "exclusively for conservation purposes" only when its terms protect the conservation purpose in perpetuity. Sec. 170(h)(5)(A); sec. 1.170A-14(a), Income Tax Regs. A contribution qualifies as having been made exclusively for conservation purposes, and is considered to protect its conservation purpose in perpetuity, when it grants its recipient a set of legally enforceable rights and restrictions sufficient to enable it to prevent any use of the property that is inconsistent with the contribution's conservation purpose, or to remedy such use. Sec. 1.170A-14(e)(1), Income Tax Regs. (incorporating paragraphs (g)(1) thru (6));

see Glass v. Commissioner, 124 T.C. 258, 277 (2005), aff'd, 471 F.3d 698 (6th Cir. 2006); see also 1982 East, LLC v. Commissioner, T.C. Memo. 2011-84, slip op. at 17-19.

A contribution's use restrictions need not prohibit ordinary use of the underlying property, or hinder pre-existing uses of the property, so long as sufficient protections are in place to prevent the destruction of, or interference with, the conservation purposes of the contribution. Sec. 1.170A-14(e), Income Tax Regs. To the extent that a contribution permits inconsistent use of the underlying property, such uses must be limited to those acts "necessary for the protection of the conservation interests that are the subject of the contribution". Id. para. (e)(3).

When the terms of a contribution reserve to the donor rights to undertake specific uses of the underlying property, the donor must be obliged to notify the donee prior to exercising such a right; the donee must be provided the right to inspect the property to ensure compliance with the contribution's terms, and to prevent or remedy acts inconsistent with the conservation purpose by legal or equitable means. Id. paras. (g)(1), (g)(5)(i) and (ii).

II. The Parties' Arguments

A. Respondent

Respondent argues that the restriction fails to qualify as having been made "exclusively for conservation purposes" as required by section 170(h)(5)(A). For purposes of this motion, respondent does not dispute that the agreement's restriction satisfies a statutory conservation purpose. Likewise, respondent does not dispute that the agreement provides AAHP a set of legally enforceable rights meant to ensure Hoffman's compliance with the agreement's written terms.

Respondent argues, however, that the scope of AAHP's legally enforceable rights is insufficient to perpetually enforce the restriction, or to prevent uses inconsistent with the restriction's conservation purpose. Respondent argues that the 45-day default provision curtails AAHP's ability both to prevent Hoffman from undertaking inconsistent uses, and to seek legal or equitable remedies of such inconsistent uses because such use would not constitute a breach of the agreement's terms.

Accordingly, respondent argues the plain language of the agreement is insufficient to be considered enforceable in perpetuity, to satisfy the requirements of section 1.170A-14(g)(1) and (5)(ii), Income Tax Regs.

B. Hoffman

Hoffman disagrees, arguing that the agreement's language is sufficient to prevent inconsistent use of the underlying property, and that the scope of AAHP's legally enforceable rights is sufficient to perpetually enforce the restriction's conservation purpose. Hoffman argues that the agreement's language expressly prohibits--that under no circumstances may Hoffman make--use of the property "inconsistent with the Secretary's Standards". Hoffman argues that the 45-day default provision operates to approve by default only proposed changes that are *ipso facto* consistent with the secretary's standards; that, by the terms of the agreement, Hoffman is prohibited from even submitting an RFP inconsistent with the secretary's standards.[7]

In the alternative, Hoffman argues that respondent's position is analogous to those advanced by the Commissioner and rejected in Simmons v. Commissioner, T.C. Memo. 2009-208, aff'd, 646 F.3d 6 (D.C. Cir. 2011), Kaufman v. Shulman, 687 F.3d 21 (1st Cir. 2012), aff'g in part, vacating in part, and remanding in part Kaufman v. Commissioner, 136 T.C. 294 (2011), and 134 T.C. 182 (2010), and BC Ranch II, L.P. v. Commissioner, 867 F.3d 547 (5th Cir. 2017), vacating and remanding Bosque Canyon Ranch, L.P. v. Commissioner, T.C. Memo. 2015-130. Hoffman argues that "for the Court to find differently would be, at a minimum, a

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[7]As an offer of textual evidence for this proposition, Hoffman invites our attention to paragraph 10.1(a) of the agreement. Paragraph 10.1 is a disclaimer whereby the parties disclaim "any rule of strict construction designed to limit the breadth of restrictions on alienation or use of property shall not apply in the construction or interpretation" of the agreement.

To the extent Hoffman believes our analysis applies a rule of strict construction--*contra proferentem*, or the like--Hoffman is mistaken. The parties do not allege, and we do not hold that an ambiguity exists within the relevant terms of the agreement. As such, we are afforded no occasion to apply any such rule of strict construction in our interpretation of the agreement's relevant provisions. Rather, we apply the plain meaning of the clear language employed by the parties to divine the meaning and operation of the contract as bargained for by the parties.

violation of the summary judgment standard requiring the Court to view any material facts and inferences in the light most favorable to the nonmoving party."

Additionally, Hoffman argues that the potential failure of AAHP to timely reject an inconsistent use RFP, and subsequent default approval thereof, constitutes an act or happening so remote as to be negligible and should therefore be absolved by section 1.170A-14(g)(3), Income Tax Regs.[8]

III. Analysis

A. The Terms of the Agreement Do Not Protect the Conservation Purpose in Perpetuity

1. Operation of Ohio Contract Law

For the purposes of this inquiry, we must ascertain the legally enforceable rights granted to AAHP by the terms of the agreement, and whether those rights are sufficient to satisfy the requirements of section 170(h)(5)(A) and section 1.170A-14, Income Tax Regs.

To determine a party's interests in and rights over property for Federal tax purposes, we apply the relevant State law. United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 (1985); Woods v. Commissioner, 137 T.C. 159, 162 (2011). Under Ohio law, the language of an easement deed is subject to the rules of contract law. Zagrans v. Elek, 2009 WL 1743203, at *3 (Ohio Ct. App. June 22, 2009). A court's primary role in examining a contract is to ascertain and give effect to the intent of the parties. Saunders v. Mortensen, 801 N.E.2d 452, 454 (Ohio 2004). Absent an ambiguity, courts will ascertain intent of the parties only

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[8]As an additional argument, Hoffman claims that even if the 45-day default provision results in the agreement failing to satisfy secs. 170(h) and 1.170A-14(g)(5)(ii), Income Tax Regs., the general public and/or the State of Ohio could enforce the terms of the agreement, and that the contribution should still qualify Hoffman for a deduction for the year at issue.

Hoffman also advanced this argument in its Motion for Reconsideration of August 11, 2017. On March 14, 2018, we issued an Order denying that motion, and rejecting this argument. Accordingly, we decline to again address this particular portion of Hoffman's argument, and choose to incorporate our analysis and holding as detailed in our Order of March 14, 2018.

as expressed in the clear language they bargained to employ. Shifrin v. Forest City Enterprises, Inc., 594 N.E.2d 499, 501 (Ohio 1992).

Contracts must be construed in a manner that gives effect to every provision. Saunders, 801 N.E.2d at 455. When interpreting a contract, courts presume that words are used for a specific purpose and will avoid interpretations that render portions of the agreement meaningless or unnecessary. Wohl v. Swinney, 888 N.E.2d 1062, 1066 (Ohio 2008). Where the general provisions of a contract conflict with a specific provision of the same document, the specific provision controls. Hilliard Props. v. Commonwealth Land Title Ins. Co., 1997 Ohio App. Lexis 5698, at *9 (Ohio Ct. App. Dec. 18, 1997) (citing Edmonson v. Motorists Mutual Ins. Co., 356 N.E.2d 722 (Ohio 1976)); Monsler v. Cincinnati Casualty Co., 598 N.E.2d 1203, 1209 (Ohio Ct. App. 1991). The construction of a contract is a matter of law. Saunders, 801 N.E.2d at 454.

2. The Plain Language of the Agreement

The agreement broadly reserves to Hoffman the absolute right to make use of the underlying property in any manner that will not "substantially impair" the open space features, or would not otherwise be "inconsistent" with the agreement's purpose. The agreement deems consistent with the agreement's purpose any use of the property not explicitly prohibited or restricted therein, and provides that Hoffman's ability to act in this regard requires no prior notification be provided to, or approval be secured from AAHP.

The agreement restricts, as relevant here, Hoffman's right to erect external signs or advertisements within the air space; construct a lateral addition to the adjacent building; develop the collectively encumbered property further; or to otherwise alter or change the appearance of the air space. The agreement, generally, prohibits Hoffman from exercising any of those restricted rights without first requesting and securing AAHP's prior written approval. AAHP maintains the authority to approve or disapprove any RFP submitted by Hoffman, and must "apply" the secretary's standards when exercising this authority.

If AAHP fails to complete its review and provide Hoffman written approval or rejection of the RFP within 45 days of receipt thereof, then the RFP is deemed approved, and Hoffman is permitted to "undertake the proposed activity in accordance with the plan or request as submitted."

The agreement provides AAHP the authority to enforce the restrictions, prohibitions, and obligations mandated by the agreement. Notably, AAHP is imbued with the power to seek all possible legal and equitable remedies for any act violating the agreement's terms.

3. Application

Conservation contributions may reserve conditional rights to donor taxpayers that permit the use and modification of conservation areas, and such a reservation of rights will not ab initio prevent a contribution from constituting a qualified conservation contribution. Sec. 1.170A-14(e) and (g)(1), (5), Income Tax Regs.; see Glass v. Commissioner, 124 T.C. at 258.

To be considered a qualified conservation contribution, however, the contribution's conservation purpose must be protected in perpetuity. Sec. 170(5)(A); sec. 1.170A-14(a), (g), Income Tax Regs. To protect the conservation purpose in perpetuity the contribution must provide its donee the ability prevent uses of the property inconsistent with the contribution's conservation purpose. Sec. 1.170A-14(g)(1), Income Tax Regs. Accordingly, the contribution must provide the qualified organization unlimited discretionary authority to approve or deny changes arising from those reserved conditional rights. See Gorra v. Commissioner, T.C. Memo. 2013-254, at *25-*28 (holding a conservation contribution as qualified because its terms granted the donee "the ultimate say in granting" the taxpayer the permission to alter the underlying property).

The agreement details and unambiguously restricts Hoffman's ability to make a number of uses with respect to the air space. These restricted uses are not prohibited uses, as Hoffman may engage in any of those restricted activities so long as it first requests and secures the written approval of AAHP. The 45-day default provision provides an unambiguous, specific, carve-out from this written approval requirement, and operates to provide Hoffman automatic approval to exercise any restricted right, whether such use is consistent with the donation's conservation purpose or not.

The general provisions of the agreement must give way to the specific. Monsler, 598 N.E.2d at 1209. The impact of the 45-day default provision is clear: it curtails AAHP's authority to review, and approve or reject Hoffman's request to make use of the property in a manner otherwise restricted by the agreement. AAHP's authority to review, and approve or reject a proposal to engage in a restricted use constitutes the only prophylactic powers provided to AAHP by the

agreement. As such, the 45-day default provision curtails AAHP's legal ability to prevent uses inconsistent with the donation's conservation purpose.

Providing the donee a mere 45-day opportunity to prevent an inconsistent use is a far cry from the perpetual right to prevent an inconsistent use as required by the Code and regulations. See sec. 170(h)(5)(A); sec. 1.170A-14(e) and (g)(1), (5)(ii), Income Tax Regs.

Further, the 45-day default provision strips AAHP of a portion of its right to legally or equitably remedy any alterations or modifications that may be inconsistent with the donation's conservation purpose. The agreement provides AAHP the authority to seek legal and equitable remedies only for "violations of the terms of" the agreement. Because any proposed use approved and undertaken by the grace of the 45-day default provision is, by its unambiguous terms, compliant with--not in violation of--the agreement, AAHP possesses no authority to remedy such use that may be inconsistent with the donation's conservation purpose. The agreement's failure to provide AAHP the ability to remedy an inconsistent use undertaken in this fashion is inadequate to protect the conservation purpose in perpetuity.[9] Sec. 170(h)(5)(A); sec. 1.170A-14(g)(5)(ii), Income Tax. Regs; see 1982 East, LLC v. Commissioner, T.C. Memo. 2011-84, slip op. at 16-19 (discussing the legislative history of section 170(h)(5), the requirement that contributions be subject to legally enforceable restrictions that prevent uses of the donor's retained interest that would be inconsistent with the conservation purpose of the contribution).

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[9]As respondent observes in his response to Hoffman's motion for reconsideration, the 2005 edition of the Conservation Easement Handbook, published by the Land Trust Alliance and the Trust for Public Land, contains a model agreement for taxpayers and qualified organizations wishing to complete a qualified conservation contribution. This model agreement is very similar to the agreement at issue here, but deviates most notably with respect to the 45-day default provision. The model agreement explicitly provides that a donee's failure to act within 45 days "shall not be deemed to constitute approval of Grantor's request" to act upon a restricted right. (emphasis added).

The Land Trust Alliance is an organization of over 1,100 land trusts throughout the United States, and the language used in its model agreement is likely used by hundreds of land trusts throughout the country.

4. Hoffman's Interpretation of the Agreement Attempts to Contravene the Plain Language of the Agreement

Hoffman argues that an appropriate comprehensive reading of Article 3 requires us to read each restricted right as containing an explicit prohibition on the exercise of such a right in a manner contrary to the secretary's standards. In other words, each right restricted by paragraph 3.1 is also a right subject to an outer limit where acting thereupon becomes per se prohibited. Where the restricted rights are subjected to these outer limit prohibitions, Hoffman argues, the terms of Article 3 also operate to foreclose Hoffman from even proposing to undertake such a course of action, to request permission to engage in activity that does not accord with the secretary's standards.

Hoffman invites our attention to the uses enumerated in and restricted by paragraph 3.1. Hoffman observes that a number of these provisions restrict Hoffman's ability to use the property "in a manner contrary to the secretary's standards." Hoffman argues that the use of this prepositional phrase in these particular individual restrictions establishes the outer limit of any otherwise permissible use restricted by the agreement.

Hoffman notes that the agreement requires AAHP to review all proposals whereby Hoffman requests permission to exercise a restricted right, and that the agreement requires AAHP to reject any proposed use it finds to be contrary to the secretary's standards. Hoffman argues that reference to this review and approval criteria in the flush language of paragraph 3.1 renders any inconsistent request or proposal per se impermissible and ineligible for review or approval by AAHP. Because the article is constructed in this manner, Hoffman argues, the language of Article 3 prohibits any use contrary to the secretary's standards and the article, as a whole, is to be read as a set of procedures that establish a method for AAHP to evaluate the appropriateness of any "actions taken by Hoffman that are otherwise allowable under the agreement."

Hoffman's arguments invite us to read the language of Article 3, and the individually restricted rights thereunder, in a manner contrary to their unambiguous language and in isolation from related operant provisions of the whole agreement. For the three reasons discussed below, we decline to do so.

First, Hoffman declines to address the operant flush language of paragraph 3.1: the conditional clause establishing how and when Hoffman may be allowed to exercise its restricted rights. Paragraph 3.1 restricts Hoffman from undertaking

any of the actions listed therein until it requests, and secures, the prior approval of AAHP. This clause is a binary switch. If Hoffman does not secure approval, then it may not engage in any of the restricted uses. If Hoffman receives approval, then it may engage in any of the restricted uses. And as addressed above, Hoffman may secure approval by default, or in writing.

Second, Hoffman's "outer limit" argument fails to correspond with the unambiguous language employed in paragraph 3.1, and is undermined by a complete reading of the agreement.

For example, paragraph 3.1(f) restricts Hoffman's ability to "[a]lter or change the appearance of the Air Space in a manner contrary to the Secretary's Standards". Article 4 reserves to Hoffman the absolute right to make use of the property in any manner not expressly restricted or prohibited by the agreement. Article 2 expressly prohibits Hoffman only from erecting satellite dishes and other broadcast antennae within the air space. In order to give effect to the whole agreement, these articles must be reconciled with one another and the restrictions of paragraph 3.1. The result of that reconciliation is clear. Hoffman holds the right to alter or change the appearance of the air space up to the point where such alterations run afoul of the secretary's standards, and to the extent Hoffman wishes to make an alteration that may fail to comply with the secretary's standards such a use is restricted until Hoffman secures the approval of AAHP.[10]

As employed in the restrictions under paragraph 3.1, the phrase "contrary to the Secretary's Standards" cannot reasonably be read in a manner other than as a descriptor that characterizes the use contemplated by that specific restriction. As the agreement stands, the language the parties chose to employ fails to reflect the prohibition-within-a-restriction advocated by Hoffman. Should the parties have intended to prohibit Hoffman's ability to alter or modify the air space in a manner advocated by Hoffman here, the parties could have simply imposed a blanket

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[10]We observe that the secretary's standards exclusively address the modification and restoration of historic buildings and structures. The agreement does not prescribe an alternative standard for AAHP to apply in reviewing proposed changes to, or restricted use of, the property's open space features or air space. The parties have not addressed this issue. Accordingly, because we conclude that the plain language of the agreement fails to sufficiently protect the contribution's statutory conservation purpose, we need and do not decide whether the secretary's standards are germane to the instant case.

restriction or prohibition on the alteration of the air space in a manner similar to those imposed in Article 2 of the agreement.

Third, Hoffman argues that Article 3 must be read in a manner which, notwithstanding the above, proscribes Hoffman from even proposing to undertake an action inconsistent with the secretary's standards. Hoffman does not invite our attention to any particular provision that may be reasonably interpreted to stand for this proposition, nor does Hoffman allege an ambiguity giving rise to such an interpretation.

In this regard, Hoffman's proposed interpretation of Article 3 is again contrary to a reading of the agreement as a whole. Article 4 provides that Hoffman may engage in any use not expressly prohibited or restricted by the agreement. Should Hoffman choose to engage in such use it is under no obligation to provide notice to or seek approval from AAHP before proceeding to engage in such use. Indeed, in the light of the Article 4 terms, there would be no need for Hoffman to submit an RFP for any use not contrary to the secretary's standards, as any such use of the property not expressly prohibited or restricted by the agreement is per se consistent with the agreement's purposes, and requires no prior notification to nor approval by AAHP. If the agreement expressly restricts uses contrary to the secretary's standards, then those are explicitly the types of uses the agreement obliges Hoffman to propose to, and receive permission from, AAHP prior to undertaking such use.

Hoffman's argument in this respect relies on an *ipse dixit* proposition: that Hoffman is prohibited from undertaking any use, or even proposing to make such use that would be contrary to the secretary's standards. This proposition is conclusory and is untethered from the plain language of the agreement. While we agree that under the terms of Article 3 AAHP ought to reject any Hoffman RFP proposing to act "contrary to the secretary's standards", we observe that there is no proscription on Hoffman's ability to propose to act in such a manner, and that should Hoffman submit an inconsistent RFP, the 45-day default provision renders moot what AAHP ought to do as, after 45 days, the provision strips from AAHP the ability to do anything.

It is clear to us that the parties negotiated these contract provisions to empower AAHP with a set of legally enforceable rights meant to generally prevent uses destructive of or inconsistent with the conservation of the air space and the open space features of the property. It is also clear to us, however, that the parties wished to limit the scope of those rights and have carefully tailored an agreement

reflective of that intent. In doing so, however, the limitations imposed on the scope of those rights cause the restriction to fail to satisfy the requirements of section 170(h)(5)(A) and section 1.170A-14, Income Tax Regs.

B. Hoffman's Alternative Positions

1. Misconstruing Respondent's Position

Hoffman argues that respondent's position[11] is analogous to those advanced by the Commissioner and rejected by the courts in Glass v. Commissioner, 124 T.C. 258 (2005), aff'd,471 F.3d 698 (6th Cir. 2006); Simmons v. Commissioner, T.C. Memo. 2009-208, aff'd, 646 F.3d 6 (D.C. Cir. 2011); and BC Ranch II, L.P. v. Commissioner, 867 F.3d 547 (5th Cir. 2017), vacating and remanding Bosque Canyon Ranch, L.P. v. Commissioner, T.C. Memo. 2015-130.[12] In each of those cases, the Commissioner attempted to challenge the deductibility of a conservation contribution. The Commissioner's challenge centered on his belief that the rights reserved by the parties in the express language of their respective contribution agreements were inconsistent with any statutory conservation purpose. The Commissioner's challenge, however, required the court to find or infer that the qualified organization would decline to enforce its rights provided, or elect to abdicate its responsibilities assigned by the express terms of the contributions.

In each of those cases, the Commissioner's challenge was rejected as the courts uniformly recognized that the competing interests of the taxpayer and the

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[11]Hoffman's argument characterizes respondent's position as an "assertion that AAHP would not enforce its rights."

[12]Hoffman also invites us to analogize respondent's position with an alternative argument addressed in the dicta of Kaufman v. Shulman, 687 F.3d 21, 28 (1st Cir. 2012), aff'g in part, vacating in part, and remanding in part Kaufman v. Commissioner, 136 T.C. 294 (2011), and 134 T.C. 182 (2010). To the extent Hoffman's Kaufman argument is not addressed, and may be construed as an request for us to conflate respondent's position with the portion of Kaufman that vacated this Court's initial holding, we observe that this case does not appear appealable to the U.S. Court of Appeals for the First Circuit, and accordingly we are not bound by that court's disposition. See Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971); see also Palmolive Bldg. Investors, LLC v. Commissioner, 149 T.C. at __ (slip op. at 31-32).

qualifying organization, as expressed in the terms of each respective contribution agreement, sufficiently guaranteed the protection of their subject conservation purposes. The courts also recognized that accepting the Commissioner's challenge required a factual finding establishing that the parties would or had collaborated to act in a manner contrary to the express terms of each agreement. The courts found, in each case, that such a proposition was wholly unsupported by the record. Accordingly, the courts rejected the Commissioner's speculative argument, and declined to ignore the express terms of the contributions that provided the qualified organizations their legal right to prevent or remedy any use of the property inconsistent with the contribution's conservation purpose. Simmons v. Commissioner, 646 F.3d at 8-11; Glass v. Commissioner, 471 F.3d at 711-713; BC Ranch II, L.P. v. Commissioner, 867 F.3d at 552.

Hoffman's argument misconstrues respondent's position. Respondent's position is unlike the positions advanced by the Commissioner in Glass, Simmons, and BC Ranch II, because, here, respondent's position does not require any factual finding or inference, or otherwise rely on a suggestion of mal- or misfeasance. Rather, in this case, respondent's position is that the express terms of the agreement fail to provide AAHP the legal rights and powers sufficient to enforce the agreement's conservation purpose in perpetuity. Respondent further argues that the language of the agreement contemplates a specific contingency, and the occasion of that contingency operates to limit AAHP's ability to prevent or remedy any use of the property inconsistent with statutory and regulatory requirements.

Based on respondent's motion before us, we have no occasion to infer[13] or otherwise presume that AAHP will fail to enforce its rights, or comply with its duties and obligations under the agreement. Instead, our holding derives from the express language of the agreement, and the contours of the legal rights and authority granted therein at the time of the contribution. Here, unlike the agreements in Glass, Simmons, and BC Ranch II, the express language of this agreement does not provide AAHP with legal rights sufficient to perpetually prevent or remedy a use of the property inconsistent with the contribution's conservation purpose. Accordingly, Hoffman's reliance on those cases is misguided.

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[13]Contract interpretation is a matter of law. See e.g., Saunders, 801 N.E.2d at 454. To the extent Hoffman, as part of its alternative argument, here, suggests our reading of the agreement's plain language results in a "violation" of summary judgment standard (i.e., that we must construe all factual inferences in favor of the nonmoving party), Hoffman's is misguided.

2. The "So Remote as to be Negligible" Standard

Hoffman argues that on the date of the contribution "the possibility that AAHP would not deny a request (within 45 days) by AAHP [sic] inconsistent with the Secretary's Standards was so remote as to be negligible." We construe this line of argument as Hoffman's attempt to avail itself of section 1.170A-14(g)(3), Income Tax Regs.

Section 1.170A-14(g)(3), Income Tax Regs., provides that the deduction for an otherwise sufficient qualified conservation contribution will not be disallowed for a contribution's failure to protect its conservation purpose in perpetuity "merely because the interest which passes to, or is vested in, the donee organization may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible."

A particular act or event will only be considered "so remote as to be negligible" when the parties would, generally, consider such an event so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction. See Palmolive Bldg. Investors, LLC v. Commissioner, 149 T.C. at __ (slip op. at 37-39).

The parties drafted the agreement to address a specific contingency: AAHP's failure to complete a timely review of, and tender a decision with respect to, any RFP advanced by Hoffman. The parties agreed that the 45-day default provision should operate to assign a consequence for any such potential failure on the part of AAHP.

The parties did not consider the operation of the 45-day default provision an improbable event. The parties did not choose to ignore or neglect the possibility that AAHP might spend more than 45 days reviewing a particular RFP. Instead the parties worked to address that specific circumstance, and assigned it a specific outcome. Accordingly, the contractual operation of the 45-day default provision cannot be considered so remote as to be negligible. Section 1.170A-14(g)(3), Income Tax Regs., will not operate to absolve the agreement of its otherwise insufficient language to preserve Hoffman's deduction.

Upon due consideration, it is hereby

ORDERED that respondent's First Amended Motion for Partial Summary Judgment, filed August 25, 2017, is granted.

(Signed) Joseph W. Nega
Judge

Dated: Washington, D.C.
March 14, 2018